No. 4245

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

AUK BAY SALMON CANNING COMPANY
(a corporation),
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

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Statement of the Case.

This is a writ of error to the District Court for the District of Alaska, Division No. 1, to review a judgment of that court by which the plaintiff in error was convicted under two counts (Record pages 3 and 4) of a violation of C. 95 of the Session Laws of Alaska for the year 1923. The law mentioned is as follows:

"Chapter 95,
AN ACT

To supplement the fish laws of the United States applicable to Alaska; to conserve the salmon supply of Alaska; to provide for closed seasons for salmon fishing, and for other purposes, and declaring an emergency.

Be it enacted by the Legislature of the Territory of Alaska:

Section 1. That it shall be unlawful to take or fish for salmon for commercial purposes, except by trollers, in the waters of Alaska between the 57th and 60th degrees of north latitude and east of the 139th meridian west longitude from the tenth day of August to the first day of September in each year.

Section 2. That it shall be unlawful to take or fish for salmon for commercial purposes, except by trollers, in the waters of Alaska south of the 57th degree of north latitude and east of 139th meridian from the 20th day of August to the 9th day of September in each year.

Section 3. That any person, firm or corporation violating any of the provisions of this act shall be guilty of a misdemeanor, and upon conviction thereof for each and every offense be punished by a fine of not less than fifty dollars ($50.00) nor more than one thousand dollars ($1,000.00), or by imprisonment in jail for not less than ten days nor more than one year, or by both such fine and imprisonment, in the discretion of the court.

Section 4. This act shall not be so construed as in anywise to alter, amend, modify or repeal any of the fish laws of the United States applicable to Alaska, or any act of Congress whatsoever relating to the fisheries of Alaska whether designed to regulate the same or passed for any other purpose whatsoever, but all such laws and acts of Congress shall be and remain in full force and effect. The purpose of this act is not to alter, amend, modify or repeal any of such laws, but to provide for further and *additional* regulation of the fisheries with a view of giving additional protection to the salmon and insuring a future supply thereof, and this act shall be construed so as to carry out the intention herein expressed and not otherwise.

Section 5. An emergency is hereby declared to exist and this act shall be in effect immediately upon its passage and approval.

Approved May 4, 1923."

The sole question in the case is the validity of this Statute the facts proved at the trial being sufficient to warrant a conviction if the Statute is valid.

Assignments of Error.

The record contains seven assignments of error appearing on pages 27 to 28 thereof. They all raise the same question, namely, the validity of the law in question and they may all be summarized as follows:

The District Court erred in holding that C. 95 of the Session Laws of Alaska for 1923 is valid.

Argument.

I.

THE LAW IS IN CONFLICT WITH THE ACT OF CONGRESS OF AUGUST 24, 1912, C. 387 (37 STATS. 512; 1 FED. STATS. ANN. 2ND ED. 251) AND IN PARTICULAR WITH SECTION 3 OF SAID ACT BECAUSE IT ALTERS, AMENDS, MODIFIES AND REPEALS THE FISH LAWS OF THE UNITED STATES APPLICABLE TO ALASKA.

(a) In General.

The section in question is as follows:

"Sec. 3. CONSTITUTION AND LAWS OF UNITED STATES EXTENDED.—That the Constitution of

the United States, and all the laws thereof which are not locally inapplicable, shall have the same force and effect within the said Territory as elsewhere in the United States; that all the laws of the United States heretofore passed establishing the executive and judicial departments in Alaska shall continue in full force and effect until amended or repealed by Act of Congress; that except as herein provided all laws now in force in Alaska shall continue in full force and effect until altered, amended, or repealed by Congress or by the Legislature: *Provided, That the authority herein granted to the Legislature to alter, amend, modify and repeal laws in force in Alaska shall not extend to the customs, internal-revenue, postal, or other general laws of the United States or to the game, fish, and fur-seal laws and laws relating to fur-bearing animals of the United States applicable to Alaska,* or to the laws of the United States providing for taxes on business and trade, or to the act entitled 'An Act to provide for the construction and maintenance of roads, the establishment and maintenance of schools, and the care and support of insane persons in the District of Alaska, and for other purposes,' approved January twenty-seventh, nineteen hundred and five, and the several acts amendatory thereof: Provided further, That this provision shall not operate to prevent the Legislature from imposing other and additional taxes or licenses. And the Legislature shall pass no law depriving the judges and officers of the District Court of Alaska of any authority, jurisdiction, or function exercised by like judges or officers of the District Courts of the United States."

In examining this section it seems quite apparent that Congress intended to reserve to itself without

the possibility of interference from the Territorial Legislature the whole subject of customs, internal revenue, postal, game, fish, fur-seal and other general laws relating to the Territory of Alaska. It seems hardly likely that Congress desired to permit any legislation by the Territorial Legislature with reference to customs, internal revenue, postal and such other general laws. The portion of the section relating to the fish laws applicable to Alaska is in the same sentence and in the same grammatical construction as the provision concerning customs, internal revenue and postal laws. The only reasonable construction to put upon the section would, therefore, seem to be that Congress considered the fish laws and the postal laws, for example, as falling in the same category so far as legislation by the Territorial Legislature is concerned. It also logically follows from the juxtaposition of these provisions that, if this law is valid, then the Alaskan Legislature is competent to change and add to the postal, customs and internal revenue laws of the United States. For example, the Legislature could require an additional postage stamp on all matter mailed in the Territory, place a high protective tariff upon goods which the general customs laws admit free, and could in general upset the whole scheme of congressional legislation with respect to such matters.

It is hardly conceivable that Congress intended any such result and it, therefore, is apparent that the whole field of legislation on these subjects, on

the fish law as well as the postal laws, was withdrawn from the jurisdiction of the Alaskan Legislature.

It may be noted in this connection that the Territorial Legislature of 1923 itself apparently believed that it had no power to regulate fisheries, and that regulation would have to come from Congress. This is shown by House Concurrent Resolution No. 12 (Session Laws Alaska 1923, p. 292). Section 5 of this resolution recites that "the laws governing the Alaska fisheries are inadequate and antiquated". Section 7 recites that the regulation of fisheries "even with the best of intentions can never be administered from Washington by officials personally unfamiliar with local conditions", and the last section says very significantly that the Legislature recognizes that the Territory "will never receive proper protection for her fisheries from the Federal Government, *and only asks the Congress of the United States for permission to prevent the extinction of her, at present, principal industry*". Then follows a form of bill which the Territorial Legislature petitions Congress to pass, and which places the entire control of fisheries in the Territory. The inference is obvious.

(b) It Has Been Decided by This Court that the Territorial Legislature is Without Power to Regulate Fisheries.

In the case of *Alaska Pacific Fisheries v. Alaska*, 236 Fed. 52; 149 C. C. A. 262, this court considered a law of Alaska which imposed certain excise taxes

upon fisheries, these taxes being in excess of those provided for in the Act of 1906 (which act is summarized in the next section of this brief). The question was the validity of these territorial taxes. They were upheld upon the sole ground that the taxing provisions of the Act of 1906 were separable from the regulatory features of that act; that the Territorial Legislature was, by the Organic Act, specifically authorized to impose additional excise taxes provided they were actually excise taxes and not regulatory measures disguised as taxes, and that hence, while the Territory had no power to *regulate* fisheries it could validly increase the taxes on fisheries. After summarizing the provisions of the Act of 1906, the court said:

> "* * * But when Congress, in 1912, conferred the legislative power which we have shown exists, *while it expressly withheld power to alter or amend laws pertaining to fish and other certain subjects and saved certain laws then in force,* it nevertheless unmistakably transferred power to the newly created legislative body to impose other and additional taxes and licenses; that is, power to impose taxes different from, and it might be additional to, those already in force when the Organic Act was approved. *And thus by the Organic Act those general provisions for the protection of the fish which we find in the Act of 1906 were kept in force without possibility of alteration, amendment, or repeal* by the Territorial Legislature, and the specific license tax provided by the Act of 1906 was kept in force, but with power transferred to the Legislature to impose,

if it should see fit, other and additional license taxes.

"We cannot agree that the portion of the Act of 1906 which provides for license fees and taxes is inseparable from the other provisions of that act. The protection and encouragement of fisheries was evidently one of the main purposes of the act, and the creation of revenue by the imposition of a license tax on the business of canning and manufacturing was another purpose. *Those portions of the act which have to do with the methods of carrying on fishing, and which prescribe the seasons when it may be carried on, and the waters within which it may be carried on, are preserved;* but the imposition of additional license taxes to be imposed for carrying on the business was a subject of a different character and, in the judgment of Congress, might properly be entrusted to the wisdom of the newly created legislative assembly * * *."

Furthermore, the United States Supreme Court has gone much further in this direction than it is necessary to go in the case at bar. In the case of *Ferris v. Higley,* 20 Wall. 375, 22 L. Ed. 383, the court considered the statute of the Territory of Utah which provided that the probate courts of the Territory should have general common law and chancery jurisdiction. The Organic Act of that Territory, after providing for a supreme court, district courts and probate courts, contained a provision that the district courts should have general original jurisdiction, and that the jurisdiction of the probate courts should be "as limited by law". The court recognized that Congress had intrusted

to the Territorial Legislature the matter of fixing the jurisdiction of the probate courts, but nevertheless held that the act extending their jurisdiction so as to include general original jurisdiction was void. The court said:

> "* * * We are of opinion that the one (the act) which we have been considering is inconsistent with the general scope and spirit of the act in defining the courts of the Territory, and in the distribution of judicial power amongst them, inconsistent with the nature and purpose of a probate court as authorized by that act, and inconsistent with the clause which confers upon the Supreme Court and District Courts general jurisdiction in chancery as well as at common law. *The fact that the judges of these latter courts are appointed by the Federal power, paid by that power—that other officers of these courts are appointed and paid in like manner—strongly repels the idea that Congress, in conferring on these courts all the powers of courts of general jurisdiction, both civil and criminal, intended to leave to the Territorial Legislature the power to practically evade or obstruct the exercise of those powers by conferring precisely the same jurisdiction on courts created and appointed by the Territory.*"

The foregoing case thus decides that where Congress has granted a certain jurisdiction to a particular court, it has impliedly forbidden the Territorial Legislature to grant similar jurisdiction to another court. In the case at bar the situation would be identical if Congress had merely passed the Act of 1906, and said nothing whatever in the Organic Act about the power of the Territory to

legislate with reference to fisheries. Under the holding of the case just cited, any regulation by the Territorial Legislature under such circumstances would be void. But to remove any possible doubt Congress has, in the case of Alaska, expressly forbidden any alteration, amendment, modification or repeal of the laws relating to fisheries. It seems too clear for serious dispute, under the doctrine of the Ferris case, that the territorial statute in question here must be declared void.

(c) Fish Laws in Force at the Time the Organic Act Was Adopted.

An examination of the fish laws in force at the time the Organic Act above quoted was adopted throws a good deal of light upon the matter. The most important of these fish laws are embodied in the Act of June 26, 1906, C. 3547 (34 Stats. 478; 1 Fed. Stats. Ann. 2nd Ed. 353 et seq.). *Section 1* of this act provides for a license tax upon the business of manufacturing fish products; *section 2* contains lengthy and detailed provisions for encouraging the operation of private fish hatcheries and an exemption from taxation in proportion to the fish hatched and liberated; *section 3* makes it unlawful to erect any structures at certain points in the waters of Alaska where such obstruction would prevent the ascent of salmon to the spawning grounds. The Secretary of Commerce is further given authority to remove any such unlawful obstructions; *section 4* makes it unlawful to operate

any fishing appliances across or within a certain distance of any salmon stream. It also makes it unlawful to operate a seine within one hundred yards of any other fishing appliance or to install a trap within a certain distance of any other fishing appliance; *section 5* provides that in certain waters of Alaska it shall be unlawful to fish except with rod, spear or gaff

> "from six o'clock post-meridian of Saturday of each week until six o'clock ante-meridian of the Monday following",

and also to fish at night in certain streams. It also provides

> "that throughout the weekly closed season herein prescribed the gate, mouth or tunnel of all stationary and floating traps shall be closed, etc.";

section 6 provides that the Secretary of Commerce may set aside any streams or lakes for spawning grounds in which fish may be limited or entirely prohibited. It also provides that the Secretary of Commerce may establish closed seasons or limit or prohibit fishing entirely for one year or more within a stream or within a certain distance of the mouth of the stream when in his judgment the number of salmon being taken from said stream is larger than its natural production. It likewise provides that such powers shall be exercised only after all persons interested have been given notice and a hearing, and further, that any order so made shall not be effective before the year after that in which it is

made. It further provides that such limitation shall not apply to persons who keep the streams in which they fish fully stocked by artificial means; *section 7* makes it unlawful to can salmon more than forty-eight hours after it has been caught; *section 8* makes it unlawful wantonly to waste or destroy salmon or other food fish; *section 9* makes it unlawful to misbrand any can of fish by misrepresenting its contents; *section 10* provides for "detailed annual reports" to the Secretary of Commerce covering all facts in connection with the operation of any salmon cannery or other fishing establishment; *section 11* provides

> "that the catching or killing, except with rod, spear or gaff of any fish of any kind or species whatsoever in any of the waters of Alaska over which the United States has jurisdiction, shall be subject to the provisions of this act, *and the Secretary of Commerce and Labor is hereby authorized to make and establish such rules and regulations not inconsistent with law as may be necessary to carry into effect the provisions of this act*";

section 12 provides for employees of the Secretary of Commerce to investigate and inspect fishing establishments; *section 13* provides penalties for violations of the act and for the forfeiture of apparatus used in violation of the act. The penalty is not exceeding $1,000 or imprisonment for not more than ninety days, or both, and also a further fine of not more than $250 per day for a violation of section 4; *section 14* provides for the venue of

actions; *section 15* repeals inconsistent laws and *section 16* provides for the taking effect of the act immediately.

(d) A Comparison of These Provisions with Those of the Act in Question Here Show a Clear Conflict.

A comparison of the law in question here and the foregoing act of Congress demonstrates that the Alaskan statute changes the law with respect to fishing in Alaska in at least the following respects:

(1) It creates a new classification separating those who fish for commercial purposes from those who fish for other purposes and then subdivides this classification into those who fish by trolling and those who fish in all other ways. Neither of these classifications appear anywhere in the Act of Congress;

(2) It prescribes a special rule for the taking of salmon whereas the Act of Congress by its express terms covers the taking of all fish (section 11);

(3) In lieu of a closed season from Saturday night until Monday morning for certain limited areas it substitutes a much longer closed season over a much greater area; in other words it repeals section 5;

(4) It makes it unlawful during the closed seasons provided for to fish with rod, spear or gaff, while section 5 expressly excepts such fishing from its operation;

(5) It provides for a closed season taking effect immediately upon the passage of the act without notice and without hearing over an area much greater than that authorized in section 6;

(6) It exercises by Act of the Legislature the power which by section 6 was expressly intrusted to the Secretary of Commerce;

(7) In place of a fine not exceeding $1,000 without a minimum or an imprisonment of not more than 90 days without a minimum, or both, it substitutes a fine of not less than $50 nor more than $1,000 or an imprisonment of not less than 10 days nor more than one year, or both; in other words the penalties for violation of the fishing regulations are very considerably increased;

(8) It makes it unlawful to fish during the closed seasons prescribed even in streams which are artificially restocked, notwithstanding the express direction of section 6 that no closed season regulation shall apply to such streams;

(9) It makes a regulation of fisheries whereas the Secretary of Commerce by section 11 is expressly given this power.

In other words the regulation prescribed by the Alaskan statute is much more burdensome than the Act of Congress, and is furthermore totally inconsistent with it. We submit that this very clearly constitutes a modification, alteration, amendment and repeal of the Act of Congress.

(e) Definition of the Terms "Alter", "Amend", "Modify" and "Repeal". They Include the Meaning "Add to".

It does not seem to us that there can be any serious doubt as to what the words "alter, amend, modify and repeal" mean. They would seem to be all inclusive and in fact are about as broad as could be hit upon. However, we submit the following definitions of the various terms:

ALTER. "To change the nature or form of; to change in some respect either partially or wholly; to change in form without destroying its identity; to change or modify the form or character of a thing without changing its identity; to cause to be different in some respect; to make a change in; to make different; to make a thing different from what it was; to make different without destroying the identity; to make some change in character, shape, condition, position, quantity, value, etc.; to make otherwise; to modify; to add to; to increase or diminish; to become different in some respects or to some extent; to vary in some degree; to vary in some degree without making the entire change."

2 *C. J.* 1165.

AMEND. "A word derived from the French word 'amender' and signifying 'to make better; to change; to change from bad to the better'; to alter, annul or remove that which is faulty and substitute that which will improve; to change in any way for the better; to correct; to correct faults; to cure an error; to cure defects; to free from error or deficiency; to improve; to rectify; to rectify mistakes and better the condition; to reform; to remove errors from; to remove what is erroneous, superfluous, faulty and the like; to repair; to revise; to substitute something in the place of what is removed; to supply deficiencies."

2 *C. J.* 1316.

MODIFY. "Change."

Lucas County Commissioners v. Fulton County Commissioners, 3 Ohio Dec. 159 (163).

"Change, vary, quality or reduce."

State v. Tucker, 36 Ore. 291; 61 Pac. 894 (897).

"Increase, reduce, change in any way or suspend."

Soule v. Soule, 4 Cal. App. 97; 87 Pac. 205.

"To change or alter the external qualities or incidents of anything; to vary; to alter; to give a new form, character, force or appearance."

Edwards v. Cooper, 168 Ind. 54; 79 N. E. 1047.

"The power to modify includes the power to amend."

Wiley v. Corporation of Bluffton, 111 Ind. 152; 12 N. E. 165 (168).

Repeal. "To recall or revoke."

Oakland Paving Co. v. Hilton, 69 Cal. 479; 11 Pac. 3 (6).

Jessee v. De Shong, (Tex.), 105 S. W. 1011.

"Annul, cancel, reverse, abolish."

City of St. Louis v. Kellman, 235 Mo. 687; 139 S. W. 443 (445);

Wilson v. People, 36 Colo. 418; 85 Pac. 187 (189).

Summing up the foregoing definitions it is apparent that the words used in this statute have

been given by the courts precisely the meaning which their common usage attaches to them. Taken as a whole it would seem too clear for argument that they prohibit the Territorial Legislature from adding to, subtracting from or in any way changing the various laws enumerated in the statute, including the fish laws. It may be said that the four words are merely synonyms, and mean nothing more than that the actual laws passed by Congress cannot be technically amended or repealed. It seems to us that just the reverse is true. The words "amend" and "repeal" have a technical meaning. If they alone were used it might well be argued that the Legislature could prescribe other rules for the various subjects mentioned in the Organic Act so long as it did not actually seek to amend or repeal, in the narrow technical sense, some act of Congress. It seems plain that the words "modify" and "alter" were inserted in the Organic Act for the precise purpose of preventing any such narrow construction.

We understand that the contention in this case is (and in fact it is expressly stated in section 4 of the act in question) that the purpose of the act is merely to *add* something to the regulations applicable to fisheries. This suggestion will be answered more fully a little later, but we call attention to it here and submit that it is merely begging the question. Under the definitions we have just quoted, and with the common meaning of

the words used in mind, it cannot be seriously urged that the so-called "additions" to the law do not constitute an alteration or modification of it. For example, it would hardly be seriously maintained that "adding" a provision for the payment of an attorney's fee did not constitute an alteration or modification of a promissory note.

(f) The Act of 26 June, 1906, Covers the Whole Field of Fisheries Regulation, and in Particular that of Closed Seasons. The Authorities Settle This Point, and Further Show that No "Additional" Regulations by the Territory Can Validly Be Set Up.

We have summarized the fish laws in force at the time the Organic Act was passed in as condensed form as possible. Even in this form, however, the summary occupies an appreciable amount of space, and even a cursory examination of the provisions of the act demonstrates that almost every conceivable detail of the regulation of fisheries was considered and legislated upon by Congress. In other words the act of Congress covers at considerable length and in quite minute detail the whole field. It covers in particular and with some care the matter of closed seasons. There are two sections (sections 5 and 6) referring to closed seasons. Those two sections provide when the closed seasons shall go into effect; where they shall be operative, and what persons they shall be applicable to. They provide for certain exceptions from their general operation; for notice and hearings; and in

fact set up all the machinery for detailed and comprehensive systems of closed seasons. It would seem obvious without argument that having carefully considered and treated the matter, Congress determined that the closed seasons therein provided for were all the closed seasons that it desired to establish. In short, Congress has entered the field and fully occupied it.

The preceding observations seem pertinent for the following reasons: It is a well settled rule that in the absence of legislation by a paramount sovereignty, an inferior legislative body may prescribe regulations; but when, and as soon as, the paramount sovereignty acts, then all right to regulate on the part of the inferior jurisdiction is suspended. The test in all of such cases is whether or not the paramount sovereignty has entered the particular field in question.

It may be assumed for the purposes of argument that in the absence of legislation by Congress the Territorial Legislature would be fully empowered to pass any fish law that it desired. It is also well settled that the power of Congress to legislate upon Territorial matters is paramount and practically unlimited even by the usual constitutional restrictions.

> *Late Corporation of the Church of Jesus Christ of Latter Day Saints v. United States,* 136 U. S. 1; 10 Sup. Ct. 792; 34 Law. Ed. 478;

Boyd v. Nebraska, 143 U. S. 135; 12 Sup. Ct. 375; 36 Law Ed. 103;
Board of Public Utility Commissioners v. Ynchansti & Co., 251 U. S. 401.

In view of these considerations, the various decisions of the United States Supreme Court with reference to the respective rights of Congress and of the states to legislate under the Commerce Clause of the Constitution are so closely analogous as to be directly in point.

In the first place it is clear as pointed out above that Congress has occupied and has intended to occupy the whole field of fishery regulations in Alaska. The following authorities go much further on this point than it is necessary to go in this case.

Adams Express Co. v. Croninger, 226 U. S. 491; 57 Law. Ed. 314; 33 Sup. Ct. 148.

This was a case arising under the Carmack Amendment to the Interstate Commerce Act. This amendment is quite short and provides in substance:

(a) For the issuance of a bill of lading;

(b) That the carrier issuing the bill of lading shall be liable to the holder thereof for any damage to or loss of property caused by it or any connecting carrier; and

(c) That the carrier shall not, by contract or regulation, exempt itself from this liability.

The state of Kentucky had a statute invalidating limitations of liability in bills of lading. The ex-

press company had issued a bill of lading at a certain rate based on a valuation of not more than $50.00. The question was whether or not the Kentucky statute could be allowed to operate in view of the Carmack Amendment. The Supreme Court held that it could not, saying:

> "That the legislation supersedes all the regulations and policies of a particular State upon the same subject results from its general character. It embraces the subject of the liability of the carrier under a bill of lading which he must issue and limits his power to exempt himself by rule, regulation or contract. Almost every detail of the subject is covered so completely and there can be no rational doubt but that Congress intended to take possession of the subject and supersede all state regulation with reference to it. Only the silence of Congress authorized the exercise of the police power of the State upon the subject of such contracts. But when Congress acted in such a way as to manifest a purpose to exercise its conceded authority, the regulating power of the State ceased to exist. Northern Pacific Ry. v. State of Washington, 222 U. S. 370; Southern Railway v. Reid, 222 U. S. 424; Mondou v. Railroad, 223 U. S. 1."

The thing that is most striking about the foregoing case is that the Carmack Amendment is very much less detailed than the act in question in the case at bar; and further, that the Carmack Amendment did not touch the question of the valuation of shipments in any manner whatever. Yet the court held that the field was so completely occupied

by Congress that the State regulations were abrogated.

In *Missouri, Kansas & Texas Railroad v. Harriman,* 227 U. S. 657; 57 Law Ed. 490; 33 Sup. Ct. 397, the same rule was applied to a limitation contained in a bill of lading of the time within which suit could be brought. Such limitation was invalid under the applicable state statute, and there was no congressional legislation upon the particular subject.

In *Atchison & Topeka Ry. v. Harold,* 241 U. S. 371 (378); 60 Law. Ed. 1050; 36 Sup. Ct. 665, the court held that the Carmack Amendment abrogated the rule of law, existing in a state by judicial decision, making a carrier liable to innocent purchasers for a mistake in the bill of lading. In this case also there was no express congressional legislation on this particular point and the theory again was that all state rules as to bills of lading were set aside.

In *St. Louis Iron Mountain & Southern Ry. v. Edwards,* 227 U. S. 265; 57 Law. Ed. 506; 33 Sup. Ct. 262, the same rule was applied to a state statute requiring the carrier to give notice to the consignee of the arrival of the shipment within twenty-four hours after arrival.

It may be noted that in all of the foregoing cases the regulations established by the states were merely additional to, and not in terms inconsistent with, the congressional legislation. The following cases

specifically decide that the states have no power to add to or supplement the acts of Congress in such matters.

In *Prigg v. Pennsylvania,* 16 Peters. 536 (617), 10 L. Ed. 1060, the court had before it certain acts of the Pennsylvania Legislature with respect to escaped slaves. In disposing of the contention that the acts of the Pennsylvania Legislature were not inconsistent with the acts of Congress and were merely "additional", the court said:

> "* * * For, if Congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner, and in a certain form, it cannot be, that the state legislatures have a right to interfere, and as it were, by way of complement to the legislation of Congress, to prescribe additional regulations, and what they may deem auxiliary provisions for the same purpose. *In such a case, the legislation of Congress, in what it does prescribe, manifestly indicates, that it does not intend that there shall be any further legislation to act upon the subject-matter. Its silence as to what it does not do, is as expressive of what its intention is, as the direct provision made by it.* This doctrine was fully recognized by this court, in the case of Houston v. Moore, 5 Wheat. 1, 21-2; where it was expressly held, that where Congress have exercised a power over a particular subject given them by the Constitution, *it is not competent for state legislation to add to the provisions of Congress upon that subject; for that the will of Congress upon the whole subject is as clearly established by what it has not declared, as by what it has expressed.*"

Erie Railroad Co. v. New York, 233 U. S. 671 (680, 683); 58 Law Ed. 1149; 34 Sup. Ct. 756. The State of New York had passed a statute prohibiting the employment of railroad employees for more than eight consecutive hours in any twenty-four hour period. The Federal Hours of Service Act prohibited interstate carriers from permitting any employee to work more than nine consecutive hours. The Court of Appeals of New York sustained the state law on the ground that there was no conflict between it and the Act of Congress of March 4, 1907, saying:

> "The state has simply supplemented the action of the Federal authorities. It is the same as if Congress had enacted that the classes of employees named might be employed for nine hours or less and the state had fixed the lesser number which was left open by the Federal Statute. The form of the latter fixed the outside limit, but not expressly legalizing employment up to that limit fairly seems to have invited and to have left the subject open for supplemental state legislation if necessary."

The Supreme Court declined to follow this reasoning. The court said:

> "We realize the strength of these observations, but they put out of view, we think, the ground of decision of the cases, and, indeed, the necessary condition of the supremacy of the congressional power. It is not that there may be division of the field of regulation, but an exclusive occupation of it when Congress manifests a purpose to enter it."

In *Charleston & Carolina Railroad Co. v. Varnville Co.,* 237 U. S. 597 (604); 59 Law Ed. 1137; 35 Sup. Ct. 715, a state statute subjected the carrier to a penalty of $50 for failure to pay claims within 40 days. The court held that such a regulation was invalid under the Carmack Amendment as applied to insterstate commerce and said:

> "When Congress has taken the particular subject matter in hand, *coincidence is as ineffective as opposition and a state rule is not to be declared a help because it attempts to go further than Congress has seen fit to go.*"

In *Southern Railway Co. v. Railroad Commission,* 236 U. S. 439 (446); 59 Law. Ed. 661; 35 Sup. Ct. 309, the court considered a statute of Indiana which required railroad companies to place grab-irons and handholds on the sides *or* ends of every railroad car. The Federal Statute required handholds to be placed on both the sides *and* the ends of the cars. The question was whether or not the carrier was liable for the penalty prescribed by the Indiana Statute. The court held that it was not. The court said:

> "* * * But so far as it did legislate, the exclusive effect of the Safety Appliance Act did not relate merely to details of the statute and the penalties it imposed, but extended to the whole subject of equipping cars with appliances intended for the protection of employes. *The States thereafter could not legislate so as to require greater or less or different equipment; nor could they punish by imposing greater or less or different penalties* * * *."

In other words this was a case where the state statute was identical so far as it went with the Federal Statute, but was somewhat less stringent in its requirements. The court nevertheless held that it was inoperative.

Seaboard Air Line v. Horton, 233 U. S. 492 (507); 58 Law. Ed. 1062; 34 Sup. Ct. 635. In this case an employee of a railroad company was injured by a defective water gauge in a locomotive. The Congressional Safety Appliance Act was in force but made no mention of such appliances as the one involved in the case. The state court held that in view of this fact the rights of the employee were to be measured by a state statute abolishing the defense of assumption of risk. The Supreme Court held that on the contrary the effect of the lack of legislation was to relegate the employee to the common law rule and not to the rule of law prescribed by the state statute.

A similar ruling was made in *Toledo, St. Louis and Western Railroad Company v. Slavin,* 236 U. S. 454; 59 Law. Ed. 671; 35 Sup. Ct. 306.

In *St. Louis, Iron Mountain & Southern Ry. v. Hesterly,* 228 U. S. 702; 57 Law. Ed. 1031; 33 Sup. Ct. 703, the question was whether or not the state statute as to distribution of the proceeds of an action for wrongful death should be followed, or whether the rule provided by the Federal Employers' Liability Act was exclusive. The state court had held "that the act of Congress was only sup-

plementary and that the judgment could be upheld under the state law"; in other words that the remedy given by Congress was simply cumulative and that it did not determine the distribution in probate proceedings. The Supreme Court decided that the act of Congress was exclusive.

The substance of the foregoing authorities is that where Congress has entered a field, then any regulation whatsoever, *whether it be identical, additional or less* than the congressional regulation, is void and of no effect. In view of the situation as to the respective powers of Congress and the Territorial Legislature it seems to us that the cases are directly in point. In fact they are somewhat stronger than is necessary in the instant case because the Territory of Alaska is wholly within the power of Congress while the states involved in these cases are, of course, independent sovereignties. They likewise on their facts go a great deal further than is necessary in the case at bar.

(g) The Rule is the Same Where Congress, as in the Act of 26 June, 1906, has Empowered an Executive or Administrative Body to Promulgate Regulations.

In addition to the foregoing we call the court's particular attention to section 11 of the fisheries law above referred to, wherein it is provided that the Secretary of Commerce may make such rules and regulations as may be necessary to carry into effect the provisions of the act. It is a fact, and matter of public record and common knowledge, that

the Secretary of Commerce has frequently exercised this power, and that the Department of Commerce has been actively engaged in regulating and inspecting the fisheries of Alaska. Various fishing reservations have been put into effect by proclamation of the President,[1] and in fact the Federal Government has at all times actively exercised the power granted in this act.[2] In this connection the decision in *Actiesselskabet Ingrid, et al. v. The Central Railroad Co. of New Jersey,* 216 Fed. 72 (82); 132 C. C. A. 316 is particularly pertinent. In that case a cargo of dynamite had exploded while on a pier in Jersey City. It was at the time waiting for transfer to a vessel bound for a foreign country. A statute of New Jersey and certain municipal regulations of Jersey City provided for the manner of handling and storing of explosives, and it was contended that these regulations had been violated. The Interstate Commerce Act had authorized the Interstate Commerce Commission to formulate regulations for the transportation of explosives, and the Interstate Commerce Commission had done so. There is nothing in the case to show that the regulations were in any manner in conflict. The Circuit Court of Appeals nevertheless held that the state and municipal regulations were of not effect, saying:

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(1) By executive order dated 3 November, 1922, President Harding created the Southwestern Alaska Fisheries Reservation, and on December 16, 1922, Secretary Hoover issued certain regulations under this order.

(2) On December 30, 1921, the Secretary of Commerce, by an order which is still in effect, promulgated certain closed season regulations under Section 11 of the Act.

> "* * * We have no doubt that the dynamite in question was subject exclusively to the regulations of the Interstate Commerce Commission. When Congress has legislated upon a subject within its constitutional control, and has manifested its intention to deal therewith in full, the authority of local jurisdiction is necessarily excluded. See Northern Pacific Railway Co. v. State of Washington, 222 U. S. 370, 378, 32 Sup. Ct. 160, 56 L. Ed. 237."

In other words the case holds that where Congress has authorized an administrative or executive federal body to promulgate regulations, then any state regulation is abrogated. This is precisely the situation in the case at bar.

(h) This Court Has Decided that an "Additional" Regulation is Invalid.

We also call the court's attention to its decision in the case of *Betsch v. Umphrey,* 270 Fed. 45 (C. C. A. 9th). This case passed upon a law of the Territory of Alaska providing that failure to file an affidavit setting out that the assessment work on a mining claim had been done should constitute an abandonment of the claim. The applicable Federal Statute provided for the filing of a similar affidavit, but made the test of abandonment whether or not the work had been done and not whether or not the affidavit was filed. This court held that the Alaska Statute was invalid. The court said:

> "* * * To legislate thus was to transcend the authority conferred by the Enabling Act, was to interfere with the right of Congress to

> dispose of the public domain, was to destroy an estate which Congress grants in public lands, and was to exercise a power which Congress never intended to delegate, the power to declare the forfeiture of mining claims."

This case, of course, was based upon another provision of the Organic Act, namely section 9, which provided that no law should be passed interfering with the primary disposal of the soil. The case is, however, very closely analogous to the one at bar, for the Legislature in that case as here had merely prescribed an additional regulation. In fact the case is somewhat stronger than the case at bar for the reason that another act of Congress authorized the making of local regulations concerning possessory title, location, manner of recording, and amount of work necessary to hold possession of a mining claim. The necessary result of the decision is that the Territory of Alaska has no power in any manner to increase or diminish the regulations prescribed by the general laws of the United States. A similar ruling was made in the case of *Territory v. Lee,* 2 Mont. 124, which held invalid a territorial statute providing that aliens should not hold mining claims. The court there said:

> "The Territory is not called upon to aid Congress or the Executive in the execution and enforcement of the laws of the general Government, and the voluntary aid of the Territory is without authority, without reason and, therefore, void."

(i) And in General, Where Congress Has Legislated Upon a Subject, the Field is No Longer a "Rightful Subject of Legislation".

And it has been further held in general that when Congress has legislated upon a particular subject, that subject is no longer a rightful one for territorial legislation. It will be remembered that section 9 of the Organic Act provides that the legislative powers of the Territory shall extend to "all rightful subjects of legislation" not inconsistent with the Constitution and laws of the United States. The case referred to is *Allen v. Reed,* 10 Okla. 105; 60 Pac. 782. The court there said:

> "Applying these well-settled principles to the case under consideration, we must come to the conclusion that the subject of fixing the boundaries of the counties of this territory, and the location and changing of the county seats therein, is a rightful subject of legislation under the organic act until such time as the national legislature legislates or enacts a law upon that subject. But when congress legislates upon the subject, as it clearly appears from the various enactments heretofore quoted in this opinion, then that subject ceases to be a rightful subject of legislation, and is inconsistent and incompatible with the laws of the United States. * * *"

It may also be noted that this case expressly adopted the view which we have urged above, that the cases under the Commerce Clause of the Constitution are in point in cases of territorial legislation upon a subject that Congress has considered. On this point the court said:

> "* * * These questions must be emphatically answered in the negative. The rule is well settled by an unbroken current of decisions of the supreme court of the United States that, *where the subject of legislation is within both the legislative power of the United States and of a state or territory, the exercise of such power by congress precludes the authority of the legislature to exercise such power.* As early as 1824, in construing the federal constitution, the question arose whether the power of congress to regulate foreign and interstate commerce is exclusive, or whether the states have concurrent authority to any extent over the same subject. * * *"

The court then proceeded to review a number of the authorities to the same effect as the ones we have above referred to.

(j) The Fish Legislation Pending in Congress Shows that Congress Has Never Intended to Open the Field to Territorial Regulation.

We further call the court's attention to the fact that there is at present pending in Congress a bill to regulate the fisheries of Alaska. This bill is known as H. R. 8143. For the purpose of reference it is attached to this brief in the form of an appendix.

We are advised that this bill will be passed in substantially the present form within a short time and very probably before the argument of this case. The importance of this is that it shows very clearly that Congress has never intended to commit the regulation of fisheries to the Territorial Legislature. As

demonstrating this it should be noted that the bill gives full power to the Secretary of Commerce to regulate fishing within the Territory; to prescribe regulations; fix closed seasons; establish reservations and in general control the whole matter of fishing. It further intrusts the enforcement of the bill to the Secretary of Commerce and the Bureau of Fisheries and not to the Territory or its officers. Finally, and most important, section 5 of the bill prescribes a closed season substantially identical to the closed season set up in the Act of 1906 but covering all of the waters of Alaska in lieu of simply a part of them; in other words Congress is definitely assuming to regulate the particular matter of closed seasons and is prescribing the exact closed seasons that it thinks are necessary. If the present Alaska law is valid, and if in particular Congress has intended to leave the matter of closed seasons to the will of the Territorial Legislature, then the regulations prescribed in this act are entirely unnecessary. Furthermore, such action by Congress is entirely inconsistent with the contention that it ever intended the Territory to have power to legislate upon this matter at all. If the Alaska Act involved in the case at bar is sustained, there is no reason whatever why this new legislation of Congress may not be entirely upset in its whole scheme of operation by socalled "additional" regulations.

(k) The Case of Alaska Fish Salting and By-Products Co. v. Smith, 255 U. S. 44, in No Manner Supports the Act.

It has been thought, and it probably will be contended, that the case of *Alaska Fish Salting & By-Products Co. v. Smith,* 255 U. S. 44; 65 Law. Ed. 489; 41 Sup. Ct. 219, lends some support to the theory that the Alaska Legislature has the power to regulate fisheries. That case considered a law of the Territorial Legislature imposing a rather heavy tax on fish oil, fertilizer and fish meal made from herring. Congress, by the Act of 1906, had imposed a lower tax on such products. The question was the validity of the Alaska law. The decision contains the following language:

> "If Alaska deems it for its welfare to discourage the destruction of herring for manure and to preserve them for food for man or for salmon, and to that end imposes a greater tax on that part of the plaintiff's industry, than upon similar use of other fish or of the offal of salmon, it can hardly be said to be contravening a *Constitution* that has known protective tariffs for a hundred years. (Citing cases) Even if the tax should destroy a business it would not be made invalid or require compensation upon that ground alone. Those who enter upon a business take that risk. (Citing cases.) *We need not consider whether abuse of the power might go to such a point as to transcend it, for we have not such a case before us. The Acts must be judged by their contents, not by the allegations as to their purpose in the complaint.*"

In connection with this it should be noted that the language used was employed in meeting the

constitutional objection that the tax deprived the plaintiff of its property without due process of law. It was used in this connection only. It is further to be noted that the court declined to look beyond the face of the act in order to determine its real purpose. The language above italicized indicates this. The court simply felt that the act in question was a legitimate taxing statute and declined to consider the characterization of it which the complaint apparently contained. The language italicized is also significant as suggesting that the power might be so abused as to constitute a violation of the Constitution. On this point we call attention to the case of *Hammer v. Dagenhart,* 247 U. S. 251; 62 Law. Ed. 1101; 38 Sup. Ct. 529. This was a case passing upon the Federal Child Labor Act where Congress had placed such a burden upon the transportation in Interstate Commerce of the products of child labor as substantially to prohibit such commerce. The court there said:

> "The difference between a tax and a penalty is sometimes difficult to define, and yet the consequences of the distinction in the required method of their collection often are important, *where the sovereign enacting the law has power to impose both tax and penalty. The difference between revenue, production and mere regulation may be immaterial, but not so when one sovereign can impose a tax only and the power of regulation rests in another.*"

The language italicized is particularly pertinent. It describes the exact situation which exists in Alaska with reference to regulation of fisheries.

Further, in connection with *Alaska Fish Co. v. Smith,* supra, it is significant that when the court passed upon the contention that the tax amounted to a regulation of fisheries, the court used no such language. It simply said:

> "But it is said that however it may be with regard to the Constitution taken by itself, the statutes brought into question are contrary to the act of Congress from which the local legislature derives its power. In the first place they are said to be an attempt to modify or repeal the fish laws of the United States. The Act of Congress of June 6, 1900, c. 786, sec. 29, 31 Stat. 321, 331; Alaska Compiled Laws, sec. 2569; imposes a tax on fish oil works of ten cents per barrel and on fertilizer works of twenty cents per ton, repeated in slightly different words by the Act of June 26, 1906, c. 3547, 34 Stat. 478; Alaska Compiled Laws, sec. 259. *But these are not fish laws as we understand the phrase.* * * *"

In other words the court decided, *and only decided,* that the act in question did not transcend the limitations of a taxing measure, and that it was merely an additional tax which the Territory was authorized to impose. The language used by the court is perhaps not as happily chosen as it might be, but when carefully considered there is nothing in that case indicating that the court believed or intended to hold that the Territorial Legislature was competent to pass purely regulatory measures with reference to fisheries. In fact the language used, and particularly the words above italicized, "but these are not fish laws as we understand the

phrase", rather supports the inference that if the law *had* been considered a fish law, an entirely different question would have been presented.

The distinction made by the Supreme Court in the case just discussed is brought out even more clearly in the case of *Alaska Pacific Fisheries v. Alaska,* 236 Fed. 52, 149 C. C. A. 262, set out at page 4b *ante.*

The court upheld the law there involved on the theory that the tax provisions in the Act of 1906 were clearly separable from the regulatory features of that act. This is precisely the distinction the Supreme Court has made in the case just cited. The court said in this connection:

> "We cannot agree that the portion of the act of 1906 which provides for license fees and taxes is inseparable from the other provisions of that act. The protection and encouragement of fisheries was evidently one of the main purposes of the act, and the creation of revenue by the imposition of a license tax on the business of canning and manufacturing was another purpose. *Those portions of the act which have to do with the methods of carrying on fishing, and which prescribe the seasons when it may be carried on, and the waters within which it may be carried on, are preserved; but the imposition of additional license taxes to be imposed for carrying on the business was a subject of a different character and, in the judgment of Congress, might properly be entrusted to the wisdom of the newly created legislative assembly.* * * *"

We feel sure that on a careful consideration, and especially on comparison with the *Alaska Pacific*

Fisheries case, the court will come to the conclusion that there is nothing in the *Alaska Fish Salting & By-Products* case which in any wise sustains the law in question here.

(l) The Debates in Congress at the Time of the Adoption of the Organic Act Throw No Light on the Question, and in Any Event Cannot Properly be Referred To.

Finally, on the general question of the power of the Legislature of Alaska to regulate fisheries, we understand that the real basis of the decision in the court below was that the debates in Congress at the time of the adoption of the Organic Act showed that it was not intended to withhold from the Territory the power to pass additional and supplementary fish laws of a regulatory nature. This contention will doubtless be made in this court. The debate referred to is somewhat long and it does not seem worth while to set it out in full. The extract which has been relied upon as showing this intention on the part of Congress is quoted in the case of *Territory v. Alaska Pacific Fisheries,* 5 Alas. 325 at p. 329. The gist of it is that Representative Mann said:

> "We have endeavored to provide in a way for the conservation of the fisheries and game up there. We ought not to permit those laws to be repealed, but if they want to make them more stringent, and probably do, they ought to have that right."

There was more or less lengthy expression of opinion by several other members of Congress, but the statement above quoted is at any rate the most

favorable one to the contention of the defendant in error.

We have two remarks to make in answer to this contention. The first is that, taking the debate on this section of the Organic Act as a whole, it would require more than human ingenuity to determine just what the various members of Congress *did* think the section meant; and second, that in any event the personal opinions of the various Legislators as to the meaning of the act are not a proper source of information for the construction of the act, or in any event, are of such little weight as to be valueless. Upon the first point we have been at some pains to read the entire debate on the Organic Act in the Committee of the Whole of the House, from which extracts above referred to are taken. This debate commences on page 5260 of the Congressional Record, Volume 48, Part 6 of the Second Session of the Sixty-second Congress. The discussion of the fisheries begins on page 5279 and concludes with the extract above quoted at page 6288. We suggest that if the court is disposed to take this position of the defendant in error seriously it read this whole portion of the discussion. We will, however, quote some of the outstanding features of the debate. It should be explained in this connection that section 3 as originally proposed by Mr. Wickersham provided that the Legislature should not alter, amend, modify and repeal the customs, internal revenue, postal and other general laws. The same provision was by amendment made ap-

plicable to the game and fish laws in consequence of the debate:

> Mr. MANN. "Under the provisions of this Bill would the Territorial Legislature have any jurisdiction over the matter of game and fisheries?
>
> Mr. WICKERSHAM. Undoubtedly, except as it might come in conflict with an Act of Congress.
>
> Mr. MANN. Does not the Bill expressly provide that if it does come in conflict with the Act of Congress, the Territorial Legislature may repeal the Act of Congress?
>
> Mr. WICKERSHAM. Not at all.
>
> Mr. MANN. I am very glad to hear the gentleman's opinion about that, *although it is very plainly in the bill.*" (p. 5279.)
>
> Mr. BUTLER. "* * * Is there anything anywhere in this proposed Act that would authorize the Legislature to change the laws in regard to conservation so as to interfere with the policies of the Government in any way in that direction?
>
> Mr. WICKERSHAM. I think not." (p. 5284.)
>
> Mr. WICKERSHAM. "I think no citizen of Alaska has been convicted of a violation of the game laws.
>
> Mr. MANN. I have no doubt that is true. I doubt whether it is very practical to convict a citizen of Alaska under ordinary conditions in the courts up there, for the same reason if they had power to change the game laws. I doubt whether it would be possible to have a law preserving the game of Alaska." (p. 5285.)

Then a little later came the debate set out in 5 Alaska, in the course of which the amendment adding the game and fish laws to the prohibited list was added. Examining this debate it is apparent that Mr. Mann, who was a strong conservationist, be-

lieved that the law, as originally framed without the inhibitions against changing the fish and game laws, would permit the Territorial Legislature to change the policy of Congress with reference to such laws and especially with reference to conservation. The amendment, however, (which in substance was proposed by Mr. Mann) was quite satisfactory to him and he immediately assumed its defense and proceeded to try and convince everyone present that it had no very serious effect. This he may or may not have succeeded in doing. At all events, reading the whole debate it certainly is impossible to determine what Representative Mann thought the amended act meant, and it is likewise difficult to determine what anyone else thought it meant. Representative Flood of Virginia, for example, said:

> "I do not think the amendment means anything, but if it will please anybody to put it in, why let it go" (p. 5288).

We submit that the debate, even assuming that it could control the meaning of a perfectly definite and unambiguous Act of Congress, offers very little consolation to the defendant in error.

We further submit that, assuming that the debate *does* mean something, nevertheless it cannot properly be considered, or at any rate given much weight, in construing the law. The authorities on this point are conclusive. In *Downes v. Bidwell,* 182 U. S. 244 (254), 45 L. Ed. 1088, 21 Sup. Ct. 770. the court said with reference to the debate in the constitutional convention:

"It is unnecessary to enter into the details of this debate. *The arguments of individual Legislators are no proper subject for judicial comment. They are so often influenced by personal or political considerations or by the assumed necessities of the situation that they can hardly be considered even as the deliberate views of the persons who made them, much less as dictating the construction to be put upon the Constitution by the Courts.*"

In *Aldridge v. Williams,* 3 Howard 9 (23), 11 L. Ed. 469, the court said:

"*In expounding this law, the judgment of the court cannot, in any degree, be influenced by the construction placed upon it by individual members of Congress in the debate which took place on its passage,* nor by the motives or reasons assigned by them for supporting or opposing amendments that were offered. The law as it passed is the will of the majority of both houses, and the only mode in which that will is spoken is in the act itself; and we must gather their intention from the language there used, comparing it, when any ambiguity exists, with the laws upon the same subject, and looking, if necessary, to the public history of the times in which it was passed."

In *Maxwell v. Dow,* 176 U. S. 581 (601), 44 L. Ed. 597, 20 Sup. Ct. 448, the court said:

"* * * It is clear that *what is said in Congress upon such an occasion may or may not express the views of the majority* of those who favor the adoption of the measure which may be before that body, *and the question whether the proposed amendment itself expresses the meaning which those who spoke in its favor may have assumed that it did, is one to be de-*

termined by the language actually therein used and not by the speeches made regarding it.

"What individual Senators or Representatives may have urged in debate, in regard to the meaning to be given to a proposed constitutional amendment, or bill or resolution, does not furnish a firm ground for its proper construction, nor is it important as explanatory of the grounds upon which the members voted in adopting it. * * *"

In *United States v. Union Pacific Railroad Co.,* 91 U. S. 72 (79), 23 L. Ed. 224, the court said:

"In construing an Act of Congress we are not at liberty to recur to the views of individual members in debate, nor to consider the motives which influenced them to vote for or against its passage. The Act itself speaks the will of Congress and this is to be ascertained from the language used."

In *United States v. Freight Ass'n,* 166 U. S. 290 (318), the court said:

"* * * It cannot be said that a majority of both houses did not agree with Senator Hoar in his views as to the construction to be given to the act as it passed the Senate. *All that can be determined from the debates and reports is that various members had various views,* and we are left to determine the meaning of this act, as we determine the meaning of other acts, from the language used therein.

"There is, too, a general acquiescence in the doctrine that *debates in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body* (Citing cases).

"The reason is that it is impossible to determine with certainty what construction was

> put upon an act by the members of a legislative body that passed it by resorting to the speeches of individual members thereof. Those who did not speak may not have agreed with those who did; and those who spoke might differ from each other; the result being that *the only proper way to construe a legislative act is from the language used in the act, and, upon occasion, by a resort to the history of the times when it was passed.* (Cases cited, supra.) If such resort be had, we are still unable to see that the railroads were not intended to be included in this legislation."

To the same effect are:

Dunlap v. United States, 173 U. S. 65 (75), 43 L. Ed. 616, 19 Sup. Ct. 319;

American Net & Twine Co. v. Worthington, 141 U. S. 468 (474), 35 L. Ed. 821, 12 Sup. Ct. 55;

Knowlton v. Moore, 178 U. S. 41 (72), 44 L. Ed. 969, 20 Sup. Ct. 747.

It seems to us that these authorities should put any question of the effect of this debate definitely out of this case.

II.

THE LAW IS ALSO INVALID FOR THE REASON THAT IT IS A SPECIAL AND LOCAL ACT.

A reference to any map will show that the act in question is limited to a comparatively small portion of the Territory of Alaska. The act operates

only in the area south of the sixtieth parallel of latitude and east of the one hundred and thirty-ninth meridian of longitude. It further subdivides this area into that above and that below the fifty-seventh parallel of latitude, and prescribes materially different rules for these two sub-areas. The act in no manner affects the Territory west of the one hundred and thirty-ninth meridian. In other words, it is an act confined in its operation to Southeastern Alaska and is not even uniform in its operation over this circumscribed territory. All of the fishing grounds of Southwestern and Western Alaska are left entirely without regulation. It is obvious without argument that this is a local and special act.

In this connection the applicable acts of Congress are as follows:

Section 9 of the Organic Act (ubi supra) which provides among other things:

> "Nor shall the Legislature pass local or special laws in any of the cases enumerated in the Act."

The Act of July 30, 1886 (24 Stats. 170; 9 Fed. Stats. Ann. Second Edition 557) provides:

> "That the legislatures of the territories of the United States now or hereafter to be organized *shall not pass local or special laws* in any of the following enumerated cases, that is to say * * * *the protection of game or fish* * * *. In all other cases where a general law can be made applicable, no special law shall be enacted in any of the territories of the United States by the territorial legislature thereof."

So far as we have been able to find there are only two cases passing on the question of what constitutes a local game or fish law: The first of these is *State v. Higgins,* 51 S. C. 51; 28 S. E. 15. In this case a fish law which was confined in its operation to two counties was held to be a local game law within a constitutional inhibition in all respects identical in meaning with the act of Congress above quoted. The court said:

> "* * * The manifest object of the act was to protect fish in the waters of Colleton and Berkeley counties, and, if fish can be regarded as game, then, being a local or special law providing for the protection of game, it is in conflict with the section of the constitution last referred to, for that section expressly forbids the enactment of any local or special law 'to provide for the protection of game'. The authorities clearly show that fish can and should be classed as game * * *."

The court also held that the act in question covered a subject to which a general law could have been made applicable and said:

> "It seems to us also that the act in question, viewed in the light contended for by the state, must be regarded as in violation of another subdivision of section 34 of article 3. Subdivision 11 of that section declares that, 'in all other cases where a general law can be made applicable, no special law shall be enacted.' It is very clear that this is a case where a general law could have been made applicable. This is conclusively shown by the terms of the first section of this very act, which, if it stood alone,

> would have been a good general law; but when the legislature saw fit, by the provision in the third section, to limit its operation to certain specified localities, the act was deprived of its character as a general law, and became a special or local law concerning a subject, and for a purpose expressly forbidden by the constitution."

The second case is *Commonwealth v. Drain,* 99 Ky. 162; 35 S. W. 269. In that case the contention was made that a provision in a game law providing for a division of fines between the county and the county officer arresting violators of the law constituted special legislation, within a constitutional prohibition against special legislation for the protection of game and fish. The court in overruling this contention said:

> "* * * That instrument does prohibit special legislation providing for the protection of game and fish; *but, manifestly, this was to remedy the common evil then prevalent, of having laws on this subject in force in some localities, and not in others.* We think the statute a general one, and in no sense special or local, within the meaning of the prohibitory clause of the constitution * * *."

The case clearly gives the reason and policy of such prohibitions. There can be no doubt that this is the policy behind such provisions. The theory clearly is to prevent the Legislature from so specializing the game and fish laws as to have a sepa-

rate game or fish code in force in each different county or other governmental subdivision.

In addition to these two cases the following authorities define what is meant by local laws. In *Commonwealth v. Patten,* 88 Pa. St. 258 (260) the court said:

> "There can be no proper classification of cities or counties except by population. *The moment we resort to geographical distinctions we enter the domain of special legislation* for the reason that such classification operates upon certain citizens or counties to the perpetual exclusion of all others."

In 1 *Lewis' Sutherland Statutory Construction,* 2nd Ed., section 199, a local law is defined as a law which is special as to place.

In *Guthrie National Bank v. Guthrie,* 173 U. S. 528, 43 L. Ed. 796, 19 Sup. Ct. 513, the question was whether or not a certain statute was a local one for the regulation of practice of courts of justice. The court held that the praticular act involved was not objectionable on that score, but used the following pertinent language:

> "The prohibition of the statute of Congress relates to the passing of a law by the territorial legislature, local or special in its nature, which does in effect regulate the mode of procedure in a court of justice *in some particular locality* or in some special case, thus altering in such locality or for such case the ordinary course of practice in the courts."

In *Territory v. Baca,* 6 New Mexico 420; 30 Pac. 864, the court considered a territorial law providing for twenty-one grand jurors in counties where a court was held for the trial of causes arising under the federal laws and for only twelve grand jurors in all other counties. The court held this statute invalid, saying:

> "* * * This, we think, is clearly in contravention of the act of congress approved July 30, 1886, which provides that no local or special law shall be enacted by the legislature of any territory for summoning or impaneling grand or petit jurors * * *."

In 36 *Cyc.* 986, the following definition appears:

> "A local act is an act applicable only to a particular part of a legislative jurisdiction."

III.

CONCLUSION.

In concluding we desire to make just one observation. That is, that the act in question is plainly merely a "feeler" on the part of the Territorial Legislature.[3] If this act is sustained it is a safe prophecy that the Legislature which convenes

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(3) By House Concurrent Resolution No. 15 (Sess. L. Al. 1923, p. 309) the Attorney General is directed "to bring one action, *only,* and to carry and prosecute the same through the courts, for the purpose of determining the validity of said act; and reporting the outcome of the same to the 1925 Session of the Territorial Legislature."

the coming winter will pour forth a flood of laws designed to regulate game, fisheries and numerous other matters which Congress has not seen fit to intrust to its jurisdiction. In the nature of things, such regulations under the guise of "supplements" and "additions" to the congressional laws must necessarily result, first, in a complete subversion of the will of Congress upon the matters with reference to which it has legislated; and second, in a hopeless confusion as to just what laws actually are in force in the Territory of Alaska. The present fish bill now in Congress which will undoubtedly be passed will be subject to such tampering as the Territorial Legislature may see fit to do; and the result will be that the complete scheme of regulations which Congress, by the Act of 1906 and the pending bill, will be subverted and distorted beyond recognition.

The situation as to fisheries in Alaska, involving as it does the interests of residents of the Pacific Coast states and the comparative interests of the citizens of Alaska, is such that the only feasible system of regulation is a control directly by Congress. Only by having such a unified control can the conflicting rights of the various parties be equitably adjusted. We submit that the acts of Congress are calculated to reserve to the national government such jurisdiction.

We believe that the decision of the lower court is wrong, for the reason that the Territory of Alaska

has no power to regulate fisheries, and for the further reason that, in any event, the regulation here established is a local law.

Dated, San Francisco,
May 21, 1924.

Respectfully submitted,

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(APPENDIX FOLLOWS.)

Appendix.

Appendix

A BILL

For the Protection of the Fisheries of Alaska, and for Other Purposes.

Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled, that for the purpose of protecting and conserving the fisheries of the United States in all waters of Alaska the Secretary of Commerce from time to time may set apart and reserve fishing areas in any of the waters of Alaska over which the United States has jurisdiction, and within such areas may establish closed seasons during which fishing may be limited or prohibited as he may prescribe. Under this authority to limit fishing in any area so set apart and reserved the Secretary may (a) fix the size and character of nets, boats, traps or other gear and appliances to be used therein; (b) limit the catch of fish to be taken from any area; (c) make such regulations as to time, means, methods, and extent of fishing as he may deem advisable. From and after the creation of any such fishing area and during the time fishing is prohibited therein it shall be unlawful to fish therein or to operate therein any boat, seine, trap, or other gear or apparatus for the purpose of taking fish; and from and after the creation of any such fishing area in which limited fishing is permitted such fishing shall be carried on only

during the time, in the manner, to the extent, and in conformity with such rules and regulations as the Secretary prescribes under the authority herein given: Provided, That every such regulation made by the Secretary of Commerce shall be of general application within the particular area to which it applies, and that no exclusive or several right of fishery shall be granted therein, nor shall any citizen of the United States be denied the right to take, prepare, cure, or preserve fish or shellfish in any area of the waters of Alaska where fishing is permitted by the Secretary of Commerce. The right herein given to establish fishing areas and to permit limited fishing therein shall not apply to any creek, stream, river, or other bodies of water in which fishing is prohibited by specific provisions of this Act, but the Secretary of Commerce through the creation of such areas and the establishment of closed seasons may further extend the restrictions and limitations imposed upon fishing by specific provisions of this or any other Act of Congress.

Sec. 2. In all creeks, streams, or rivers, or in any other bodies of water in Alaska, over which the United States has jurisdiction, in which salmon run, and in which now or hereafter there exist racks, gateways, or other means by which the number in a run may be counted or estimated with substantial accuracy, there shall be allowed an escapement of not less than 50 per centum of the total number thereof. In such waters the taking of more than 50 per centum of the run of such fish

is hereby prohibited. It is hereby declared to be the intent and policy of Congress that in all waters of Alaska in which salmon run there shall be an escapement of not less than 50 per centum thereof, and if in any year it shall appear to the Secretary of Commerce that the run of fish in any waters has diminished, or is diminishing, there shall be required a correspondingly increased escapement of fish therefrom.

Sec. 3. Section 3 of the Act of Congress entitled "An Act for the protection and regulation of the fisheries of Alaska", approved June 26, 1906, is amended to read as follows:

"Sec. 3. That it shall be unlawful to erect or maintain any dam, barricade, fence, trap, fish wheel, or other fixed or stationary obstruction, except for purposes of fish culture, in any of the waters of Alaska at any point where the distance from shore to shore is less than one thousand feet, or within five hundred yards of the mouth of any creek, stream or river into which salmon run, excepting the Karluk and Ugashik Rivers, with the purpose or result of capturing salmon or preventing or impeding their ascent to the spawning grounds, and the Secretary of Commerce is hereby authorized and directed to have any and all such unlawful obstructions removed or destroyed. For the purposes of this section, the mouth of such creek, stream, or river shall be taken to be the point determined as such mouth by the Secretary of Commerce and

marked in accordance with his determination. It shall be unlawful to lay or set any seine or net of any kind within one hundred yards of any other seine, net or other fishing appliance which is being or which has been laid or set in any of the waters of Alaska, or to drive or to construct any trap or any other fixed fishing appliance within six hundred yards laterally or within one hundred yards endwise of any other trap or fixed fishing appliance."

Sec. 4. Section 4 of said Act of Congress approved June 26, 1906, is amended to read as follows:

"Sec. 4. That it shall be unlawful to fish for, take, or kill any salmon of any species or by any means except by hand rod, spear, or gaff in any of the creeks, streams, or rivers of Alaska; or within five hundred yards of the mouth of any such creek, stream, or river over which the United States has jurisdiction, excepting the Karluk and Ugashik Rivers: Provided, That nothing contained herein shall prevent the taking of fish for local food requirements or for use as dog feed."

Sec. 5. Section 5 of said Act of Congress approved June 26, 1906, is amended to read as follows:

"Sec. 5. That it shall be unlawful to fish for, take, or kill any salmon of any species in any manner or by any means except by hand rod, spear, or gaff for personal use and not for sale or barter in any of the waters of Alaska over which the post meridian of Saturday of each week until six o'clock United States has jurisdiction from six o'clock

ante meridian of the Monday following, or during such further closed time as may be declared by authority now or hereafter conferred, but such authority shall not be exercised to prohibit the taking of fish for local food requirements or for use as dog feed. Throughout the weekly closed season herein prescribed the gate, mouth or tunnel of all stationary and floating traps shall be closed, and twenty-five feet of the webbing or net of the 'heart' of such traps on each side next to the 'pot' shall be lifted or lowered in such manner as to permit the free passage of salmon and other fishes."

Sec. 6. Any person, company, corporation, or association violating any provision of this Act or of said Act of Congress approved June 26, 1906, or of any regulation made under the authority of either, shall, upon conviction thereof, be punished by a fine not exceeding $5000 or imprisonment for a term of not more than ninety days in the county jail, or by both such fine and imprisonment; and in case of the violation of section 3 of said Act approved June 26, 1906, as amended, there may be imposed a further fine not exceeding $250 for each day the obstruction therein declared unlawful is maintained. Every boat, seine, net, trap, and every other gear and appliance used or employed in violation of this Act or in violation of said Act approved June 26, 1906, and all fiish taken therein or therewith, shall be forfeited to the United States, and shall be seized and sold under the direction of the court in which the forfeiture is declared, at public

auction, and the proceeds thereof, after deducting the expenses of sale, shall be disposed of as other fines and forfeitures under the laws relating to Alaska. Proceedings for such forfeiture shall be *in rem* under the rules of admiralty.

That for the purposes of this Act all employees of the Bureau of Fisheries, designated by the Commissioner of Fisheries, shall be considered as peace officers and shall have the same powers of arrest of persons and seizure of property for any violation of this Act as have United States marshals or their deputies.

Sec. 7. Sections 6 and 13 of said Act of Congress approved June 26, 1906, are hereby repealed. Such repeal, however, shall not affect any act done or any right accrued or any suit or proceedings had or commenced in any civil cause prior to said repeal, but all liabilities under said laws shall continue and may be enforced in the same manner as if committed, and all penalties, forfeitures, or liabilities incurred prior to taking effect hereof, under any law embraced in, changed, modified, or repealed by this Act, may be prosecuted and punished in the same manner and with the same effect as if this Act had not been passed.